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**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

SUE EVENWEL, EDWARD PFENNINGER,) AU:14-CV-00335-LY-CH-MHS
Plaintiffs,)
VS.) AUSTIN, TEXAS
RICK PERRY, NANDITA BERRY,)
Defendants.) JUNE 25, 2014

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE
MICHAEL H. SCHNEIDER, LEE YEAKEL
& CATHARINA HAYNES,

APPEARANCES:

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Proceedings recorded by computerized stenography, transcript
produced by computer.

09:00:12 1 (Open Court)

09:00:12 2 JUDGE YEAKEL: The Court calls for argument on
09:00:15 3 Defendants' motion to dismiss, Cause Number 14-CV-335, *Evenwel*
09:00:21 4 and others v. *Perry* and others.

09:00:24 5 Is the movant ready?

09:00:26 6 MS. KANE: The movant is ready, Your Honor. Thank
09:00:28 7 you.

09:00:28 8 JUDGE YEAKEL: And is the respondent ready?

09:00:30 9 MR. CONSOVOY: We are, Your Honor.

09:00:32 10 JUDGE YEAKEL: All right. We have allocated 30
09:00:35 11 minutes to the side for argument this morning. The movant may
09:00:40 12 divide the movant's time however the movant sees fit. And at
09:00:43 13 this time, if you're ready to proceed, we will proceed.
09:00:46 14 Ms. Kane.

09:00:47 15 MS. KANE: Thank you, Your Honor. May it please the
09:00:55 16 Court:

09:00:56 17 The defendants -- the State's arguments put forward
09:01:00 18 in its motion to dismiss are relatively straightforward. The
09:01:03 19 State asks this court to dismiss the suit for failure to state
09:01:05 20 a claim because plaintiffs' equal protection claim is based on
09:01:09 21 a legal theory that has never been recognized by any federal
09:01:11 22 court.

09:01:11 23 To the contrary, the theory put forward by the
09:01:14 24 plaintiffs in this case has been essentially rejected by three
09:01:17 25 circuits -- the Fourth, Fifth, and Ninth circuits. Further,

09:01:20 1 pursuant to language contained in the Supreme Court's 1966
09:01:23 2 opinion, *Burns V. Richardson*, that court has made no
09:01:29 3 distinction -- quote, no distinction between the acceptability,
09:01:30 4 unquote, of State's decision to use total population data as an
09:01:34 5 apportionment base for redistricting versus other sets of data
09:01:38 6 such as voter population or citizen population. In the Supreme
09:01:43 7 Court's words in *Burns*, it found no, quote, constitutionally
09:01:45 8 founded reason, unquote, to interfere with such a choice.

09:01:48 9 To the extent the plaintiffs here assert that this
09:01:50 10 case is distinguishable because they assert Texas can draw its'
09:01:54 11 Senate districts to equalize both total population and citizen
09:01:58 12 voting age population or some other set of voter citizenship
09:02:01 13 data, any rule of law -- of law adopted by this court that
09:02:05 14 would require the State to equalize both sets of population in
09:02:08 15 order to satisfy equal protection would be counter to
09:02:13 16 principles of deference to state legislative choices.

09:02:15 17 JUDGE HAYNES: Let me ask you this: Regardless of
09:02:17 18 whether it's required constitutionally, is it doable? I mean,
09:02:18 19 do you agree that it is doable to equalize both sets of data?

09:02:22 20 MS. KANE: I think for purposes of the posture of
09:02:24 21 this motion, we have to take their factual allegations as true.
09:02:27 22 So whether or not ultimately that will be proven, I think for
09:02:30 23 purposes of our motion, we have to assume that that would
09:02:33 24 technically be correct.

09:02:34 25 And so our position is, even assuming that is

09:02:37 1 correct, that there is no constitutionally founded reason to
09:02:41 2 require the state to draw their maps on -- in that way. And
09:02:45 3 so, yes, that's where we are -- what our position is at this
09:02:49 4 moment. That could change if this case proceeds, of course, to
09:02:52 5 summary judgment.

09:02:53 6 So taking the three main points essentially --

09:02:56 7 JUDGE SCHNEIDER: Let me interrupt just one second.

09:02:58 8 As Judge Haynes raised the question, is there any deviation
09:03:05 9 of -- that would concern you, I mean, at any level of the
09:03:12 10 disproportion or non-representation on the part of voters? Is
09:03:17 11 there any percentage that would disturb you or raise an issue?

09:03:22 12 MS. KANE: Your Honor, I think for purposes of the
09:03:24 13 one-person, one-vote challenge, the State's position is that so
09:03:30 14 long as one set of recognized viable population data is
09:03:37 15 equalized, that that satisfies that bar. I think the issue
09:03:40 16 with respect to the CVAP data might have other implications in
09:03:45 17 other ways. For example, in maybe Voter Registration Act type
09:03:50 18 claims or things of that nature. But for purposes of the
09:03:54 19 one-vote, one-person challenge that's at issue here, the
09:03:56 20 State's position is that is not relevant to the determination
09:03:59 21 so long as the State can show or the evidence shows, as the
09:04:02 22 case is here, that a relevant set of population data, here
09:04:06 23 being the total population data, is equalized within
09:04:09 24 percentages allowed by the Supreme Court. And it is in this
09:04:12 25 case.

09:04:13 1 JUDGE SCHNEIDER: Well, so you could never reach a
09:04:15 2 level that -- that bothered you -- a deviation that bothered
09:04:19 3 you?

09:04:20 4 MS. KANE: Well, I think for purposes, again, of the
09:04:22 5 one-person, one-vote challenge, I don't think that there has
09:04:25 6 been a holding that would say that there is some threshold that
09:04:29 7 you could have total population data equalize and then some
09:04:33 8 deviation that meets some sort of ceiling or floor on deviation
09:04:40 9 that would then put you into a one-person, one-vote violation
09:04:46 10 based on what the Supreme Court has said thus far on this
09:04:49 11 issue.

09:04:49 12 JUDGE SCHNEIDER: Okay.

09:04:51 13 JUDGE YEAKEL: Well, what is the strongest
09:04:54 14 pronouncement by the Supreme Court that differs from just
09:04:58 15 looking at gross numbers of people -- so a variation on
09:05:05 16 one-person, one-vote? What has the Supreme Court said that you
09:05:08 17 think is strongest that would mitigate in favor of changing a
09:05:15 18 system that is based solely on people in an area?

09:05:19 19 MS. KANE: I don't think the -- so if I understand
09:05:21 20 the Court's question, what has the Supreme Court said that
09:05:25 21 might support that there is some sort of deviation that will
09:05:29 22 reach such a result -- or such a high mark in CVAP that you
09:05:33 23 need to consider that even though you need full total
09:05:35 24 population? Is that what the Court is asking?

09:05:38 25 JUDGE YEAKEL: Yeah.

09:05:38 1 MS. KANE: And I think the court hasn't given an
09:05:40 2 indication that there is that marker. And I think the *Burns*
09:05:44 3 case -- and the State agrees, frankly, with the Fifth Circuit
09:05:47 4 and the Fourth Circuit's interpretations of the *Burns* case in
09:05:50 5 both *Daly* in the Fourth Circuit and the *Chen* case in the Fifth
09:05:55 6 Circuit, in which that court looked at the language and the
09:05:57 7 very permissive and deferential language of the Supreme
09:06:00 8 Court -- and deliberately so, deferential language of the
09:06:06 9 Supreme Court in *Burns* -- to basically recognize that there is
09:06:10 10 a sphere here of deference that is given to the State
09:06:16 11 Legislature on which population data to use.

09:06:18 12 And, thus far, the Supreme Court has not said that
09:06:21 13 there is some number that might be hit where those -- for
09:06:27 14 example, voting age population and total population deviate --
09:06:30 15 that would then require a state to equalize both sets of
09:06:35 16 population or to at least approximately equalize both
09:06:39 17 populations, if possible. The court has simply not indicated
09:06:42 18 that that is required under the Equal Protection Clause.

09:06:46 19 Now, I think --

09:06:47 20 JUDGE HAYNES: So let me ask you this: Do you think
09:06:49 21 this case so insubstantial that it should not be -- have been
09:06:53 22 certified for a three-judge panel and should have just been
09:06:55 23 dismissed by Judge Yeakel.

09:06:57 24 MS. KANE: Well, I think that it would have been
09:06:59 25 entirely reasonable to do that. And I think if you look at the

09:07:07 1 Second Circuit's case -- again, that was a federal
09:07:09 2 congressional redistricting case of *Kalson v. Paterson* which we
09:07:10 3 cite in our footnotes -- where there -- it was a slightly
09:07:14 4 different posture, I think, in terms of the argument made
09:07:18 5 because it was a very specific argument made that voting age
09:07:22 6 population should have been equalized and that was in itself a
09:07:25 7 one-person, one-vote violation. But there the district court
09:07:28 8 judge, a single judge, dismissed that and the Second Circuit
09:07:32 9 affirmed that decision based on the fact that they found that
09:07:34 10 claim to be too insubstantial to require the certification of a
09:07:38 11 three-judge panel.

09:07:39 12 So, given that, we're already at a place where
09:07:41 13 there's a three-judge panel in place. So --

09:07:42 14 JUDGE HAYNES: We drove to Austin; we may as well
09:07:45 15 hear the case, you think?

09:07:46 16 MS. KANE: So whether or not one could undo that at
09:07:49 17 this point, I think, is a question maybe --

09:07:50 18 JUDGE HAYNES: Well, that was going to be my next
09:07:52 19 question. And I'm just exploring the whole waterfront. So
09:07:55 20 don't take anything from this question. But if we got to that
09:07:59 21 point, where we felt it was so insubstantial that it could have
09:08:01 22 just been handled by one judge, is there a procedure for a
09:08:04 23 three-judge panel to rule that and then the one judge make his
09:08:10 24 ruling.

09:08:10 25 MS. KANE: I'm not aware of a case with that type of

09:08:14 1 posture. I will say that the statute governing three-judge
09:08:17 2 panels does allow one judge to rule on certain matters. As the
09:08:23 3 *Kalson* case --

09:08:23 4 JUDGE HAYNES: Right. But not obviously -- if this
09:08:25 5 is a three-judge matter, Judge Yeakel can rule on continuances
09:08:29 6 and scheduling and all that, but he can't rule on the ultimate
09:08:32 7 merits. However, if it should have been a one-judge matter in
09:08:36 8 the first place and the three-judge panel says that, then it
09:08:38 9 would seem like it goes back to the one judge and then he ...

09:08:42 10 MS. KANE: And the *Kalson* case certainly supports the
09:08:45 11 proposition that, should then the Fifth Circuit find that this
09:08:48 12 is an insubstantial question that was presented because an
09:08:50 13 order from one judge would go up to the Fifth Circuit -- and
09:08:53 14 one, frankly, might presume that the Fifth Circuit would say
09:08:56 15 that, given that they've rejected very similar claims to this
09:08:59 16 twice now -- then if they found that this was insubstantial,
09:09:03 17 then one judge disposing of this case would be permissible if
09:09:06 18 you look at the *Kalson* case as an example.

09:09:10 19 So while we're not advocating that that's the
09:09:12 20 necessary result here, we did want to point out a very similar
09:09:15 21 posture in the *Kalson* matter out of the Second Circuit because
09:09:20 22 it does appear to provide a particular avenue that might be
09:09:23 23 available as a resolution in this case.

09:09:25 24 Regardless --

09:09:27 25 JUDGE HAYNES: Now, let me go to the other side.

09:09:29 1 Let's say you lose this motion to dismiss and the plaintiffs
09:09:32 2 hit a home run in the case. What -- you know, what does that
09:09:37 3 look like? If we order the Legislature to consider CVAP and
09:09:42 4 not supplant total -- and I'm going to ask them about it. As I
09:09:47 5 appreciate their argument, they're not saying you supplant
09:09:50 6 total population with CVAP. It's just that it's supposed to be
09:09:53 7 considered. What would that look like, and how would that
09:09:56 8 materialize in the course of the next legislative session?

09:10:04 9 MS. KANE: Your Honor, I think that if this court
09:10:05 10 were to find that we have to consider CVAP, it opens up kind of
09:10:08 11 a world of potential possibilities as to how that might be
09:10:12 12 measured. Because I think what we do know is that there is a
09:10:16 13 fairly broad world of discretion here that the legislature has
09:10:22 14 in terms of deviating even from an equalizing -- once you even
09:10:26 15 have a set of population data that is an approved apportionment
09:10:29 16 base, the states are allowed to deviate from equalizing if they
09:10:34 17 have sound policy reasons.

09:10:35 18 So now if we have a finding from this court or,
09:10:38 19 ultimately, the Supreme Court saying that we have to consider
09:10:41 20 not only total population data but, if the facts show a
09:10:46 21 particular deviation between CVAP and total population, we also
09:10:50 22 have to consider CVAP or some other, you know, set of voter
09:10:53 23 registration data -- if that is found, then I think the
09:10:57 24 corresponding rules that will then have to be kind of meted out
09:11:02 25 to determine how you determine compliance with the Equal

09:11:06 1 Protection Clause, once you have two sets of population data at
09:11:09 2 issue, is really going to be an open question that is difficult
09:11:13 3 to discern at this point because we've never had, essentially,
09:11:16 4 two metrics upon which a state has to show compliance in order
09:11:21 5 to demonstrate compliance with the Equal Protection Clause.

09:11:25 6 JUDGE HAYNES: Okay. Let me add another sort of
09:11:26 7 layer here. As I understand it, there's this *Davis* case in
09:11:30 8 Judge Garcia's court that's a three-judge panel of
09:11:32 9 Judges Smith, Rodriguez, and Garcia. I may have that wrong.

09:11:36 10 MS. KANE: That's correct.

09:11:36 11 JUDGE HAYNES: I know there is a pending case
09:11:38 12 regarding the exact same districts.

09:11:40 13 MS. KANE: Not the Senate districts. There's a
09:11:43 14 House -- the House --

09:11:44 15 JUDGE HAYNES: But I thought that they wrote -- I
09:11:47 16 thought that that court wrote the thing that the state adopted.

09:11:50 17 MS. KANE: Oh. Excuse me. Yes. There is no longer
09:11:53 18 a challenge to the Senate map, but there was in the first
09:11:56 19 round.

09:11:57 20 JUDGE HAYNES: Okay. So what does -- so they wrote a
09:11:58 21 map, the legislature adopted it. Then what happens if we say
09:12:03 22 we're going to undo that? What happens to that case?

09:12:05 23 MS. KANE: Well, the -- this precise type of
09:12:09 24 challenge was not at issue there. It was a --

09:12:11 25 JUDGE HAYNES: No. I know. But you can only have

09:12:13 1 one -- one district that we're voting in, I hope.

09:12:16 2 MS. KANE: Yes.

09:12:17 3 JUDGE HAYNES: So if they've written it to try to
09:12:19 4 deal with voting rights act issues and issues of minority
09:12:24 5 representation and so forth and that's been handled, then we
09:12:26 6 come over here, it's like the game where you're hitting the
09:12:29 7 head of the squirrel or whatever, where another thing pops up
09:12:32 8 so we come over here and say this. Now does that then create
09:12:36 9 another issue over there, whether it's literally over there or
09:12:40 10 not?

09:12:40 11 MS. KANE: I don't know if it necessarily creates
09:12:42 12 another issue. What I think that the Court is getting at is
09:12:44 13 language that you'll see in the *Daly* case out of the Fourth
09:12:48 14 Circuit that talks about a case called *Gaffney* in the Supreme
09:12:52 15 Court in which they express concern with this idea of requiring
09:12:57 16 basically another set of population data that had to be
09:13:01 17 equalized because, again, the further the courts go into this
09:13:06 18 judicial intervention in this sphere, then there is a question
09:13:09 19 as to -- as to what point does that end.

09:13:12 20 And so the *Daly* court in its resolution of this
09:13:16 21 particular type of claim in which the argument was made that
09:13:18 22 voting age population should have been equalized instead of
09:13:21 23 total population specifically addressed this issue and said, if
09:13:24 24 you look at what the Supreme Court has done in this area, it's
09:13:27 25 consistently resisted this notion of judicial intervention

09:13:31 1 unless naturally necessary precisely because of this concern;
09:13:35 2 that, essentially, the more requirements you're imposing on a
09:13:40 3 state, then the further the, you know, judiciary is going to be
09:13:45 4 intervening into these matters. And as it is, and this court
09:13:48 5 is well aware, redistricting litigation is fairly extensive as
09:13:52 6 it is.

09:13:52 7 So if the court were to impose yet another metric,
09:13:54 8 another line upon which the court must -- or the state must
09:13:59 9 comply, then that only again compounds this concern of judicial
09:14:03 10 intervention into a sphere that the Supreme Court has, again,
09:14:06 11 recognized time and again should be left to the discretion of
09:14:09 12 the state legislature whenever possible.

09:14:15 13 And for that reason in particular -- you know, as
09:14:16 14 best I can understand the plaintiff's argument in this case,
09:14:19 15 they're distinguishing their argument here from *Daly*, *Chen*, and
09:14:23 16 the *Garza* case out of the Ninth Circuit based on an argument
09:14:27 17 that the data at issue here presents a situation in which the
09:14:30 18 State could essentially draw a better map than currently exists
09:14:35 19 because it could equalize, theoretically, the CVAP population
09:14:40 20 and total population.

09:14:42 21 JUDGE HAYNES: Okay. So now I have another practical
09:14:44 22 question. So when you let the circuit judge out of the room
09:14:47 23 and bring them into a trial court, we get practical.

09:14:50 24 We're in the middle of a Senate election as far as I
09:14:53 25 know.

09:14:53 1 MS. KANE: Yes.

09:14:54 2 JUDGE HAYNES: I live in a district where we had a
09:14:56 3 primary and a runoff and somebody is now the nominee for each
09:14:59 4 of the major parties. What would happen to these people if
09:15:04 5 we're having to redraw -- I mean, because the legislature isn't
09:15:07 6 even going to meet between now and November unless I guess
09:15:10 7 they're ordered to. I don't know. Anyway, they're not
09:15:13 8 scheduled to meet. So what happens to the coming election, the
09:15:18 9 November election, where we already have nominees at least for
09:15:22 10 one party in every district and possibly two or three parties
09:15:25 11 going into November?

09:15:27 12 MS. KANE: I'll say this, Your Honor: The plaintiffs
09:15:28 13 have not moved for preliminary injunction, and I'll leave this
09:15:32 14 to Plaintiffs to further explain. There has been no indication
09:15:36 15 that there is an intention to, if this court were to find --
09:15:41 16 frankly, if this court were to find, ultimately, that the State
09:15:45 17 was required to do this, I'm sure the State would ask for some
09:15:47 18 sort of stay of that for purposes of this legislative session
09:15:52 19 and we would have to get into that. But I don't think that the
09:15:55 20 plaintiffs are necessarily pushing for this to have any effect
09:15:58 21 on this year's election cycle. Whether or not it has an effect
09:16:02 22 on later cycles of course is going to be an open issue. But I
09:16:06 23 don't think that is an issue squarely presented by the
09:16:09 24 plaintiff's request for relief in this case, at least at this
09:16:12 25 moment in time. But, again, this is an issue that is raised

09:16:17 1 anytime you have this type of litigation. There's a lot of
09:16:22 2 administrative practicalities to implementing these rules.
09:16:25 3 I would -- so for purposes of just the points that
09:16:28 4 we've raised in our motion to dismiss, frankly, we think the
09:16:31 5 court can look to the *Burns* case and the language contained
09:16:37 6 therein to resolve this case, as the *Daly* court as the *Chen*
09:16:40 7 court did. *Burns* specifically says the court found no
09:16:44 8 constitutionally founded reason to interfere with the state's
09:16:48 9 choices to include or exclude certain populations, such as
09:16:52 10 registered voters, aliens, things of that nature, from their
09:16:56 11 apportionment base. And that is essentially what we have here.
09:16:59 12 The plaintiffs have pointed to no --

09:17:01 13 JUDGE YEAKEL: Is your argument that -- is it your
09:17:05 14 argument that what *Burns* is basically saying is the courts can
09:17:10 15 look at this, but if the courts find that there is a valid
09:17:14 16 reason for what the legislature considered, we should leave it
09:17:17 17 alone as opposed to developing a whole new checklist that
09:17:22 18 legislative bodies should have to go through and account for in
09:17:25 19 every case?

09:17:26 20 MS. KANE: Yes.

09:17:27 21 JUDGE YEAKEL: We look at it on a-redistricting-plan-
09:17:30 22 by-redistricting-plan basis to see if it meets the test in
09:17:34 23 *Burns*?

09:17:34 24 MS. KANE: Yes. And I think what the court in *Burns*
09:17:36 25 is saying that, of course, I think there's a reference, for

09:17:39 1 example, in the plaintiff's response to our motion in which
09:17:43 2 they say, what the State is arguing, essentially, is that, for
09:17:45 3 example, it could only include property owners in its
09:17:48 4 apportionment base and that wouldn't be judicial reviewable.

09:17:51 5 That's, frankly, not what we're saying. What we're
09:17:54 6 saying is, of course, there are decisions, and the *Burns* court
09:17:57 7 points to a case in which Texas had actually excluded
09:18:00 8 military -- enlisted military persons who were citizens -- in
09:18:05 9 residents of Texas from their apportionment base. That was
09:18:07 10 found to be constitutionally infirm because you had qualified
09:18:10 11 voters who were being excluded from the apportionment base.

09:18:13 12 So the *Burns* court has clearly signaled that there
09:18:15 13 are -- there could be populations that, if you exclude them
09:18:18 14 from your apportionment base, are going to be grounds for
09:18:21 15 judicial intervention. However, the plaintiffs in this case
09:18:25 16 have pointed to no such populations that the Supreme Court has
09:18:28 17 indicated should -- are impermissibly included or excluded from
09:18:33 18 the total population apportionment base that Texas used to draw
09:18:37 19 its Senate maps. And unless and until that is identified, the
09:18:40 20 *Burns* court indicates -- or its language seems to clearly
09:18:43 21 indicate that the State has discretion to decide which
09:18:48 22 population it wishes to use, so long as it abides by not
09:18:53 23 excluding or including population the constitution expressly
09:18:57 24 forbids.

09:18:58 25 JUDGE YEAKEL: So we should be reactive on a

09:19:00 1 plan-by-plan basis, not proactive, in coming up with a set of
09:19:05 2 rules which must be done by each state legislature and each
09:19:09 3 state, regardless of its individual situation?

09:19:11 4 MS. KANE: Certainly, Your Honor. And, again, the
09:19:14 5 cases time and again from the Supreme Court used the word
09:19:17 6 deference, and that is what is at play here. And, again, that
09:19:21 7 is what the *Chen* court and the *Daly* court also looked at.

09:19:24 8 JUDGE HAYNES: And isn't that what happened in *Davis*?
09:19:26 9 I mean, it's kind of an interesting fact pattern because the --
09:19:28 10 the district court writes an interim map.

09:19:32 11 MS. KANE: Yes.

09:19:33 12 JUDGE HAYNES: The Supreme Court says you didn't give
09:19:36 13 enough deference, and then the legislature adopts that map
09:19:39 14 anyway.

09:19:39 15 MS. KANE: I'm sorry. For which case, Your Honor?

09:19:42 16 JUDGE HAYNES: Well, I think it was *Perez* to begin
09:19:44 17 with and now is *Davis*.

09:19:46 18 MS. KANE: The current case, you mean?

09:19:48 19 JUDGE HAYNES: Yeah.

09:19:48 20 MS. KANE: The current redistricting case?

09:19:50 21 JUDGE HAYNES: Well, the current. You know, it's
09:19:51 22 been going on for so many years. But it had one -- at least
09:19:55 23 one iteration in the Supreme Court that I know of.

09:19:56 24 MS. KANE: Yes, it has.

09:19:57 25 JUDGE HAYNES: And I thought the import of that was,

09:19:59 1 even in a situation where it's been established that there are
09:20:03 2 Voting Rights Act problems with what the legislature did, you
09:20:06 3 still can't ignore -- if you're over here in district X that
09:20:10 4 doesn't have that problem, you can't suddenly run around
09:20:14 5 redrawing that unless it's necessary to deal with district Y
09:20:17 6 that has the problem.

09:20:19 7 MS. KANE: Yes.

09:20:19 8 JUDGE HAYNES: Because you have to start from the map
09:20:21 9 the legislature did.

09:20:23 10 MS. KANE: Yes. Again --

09:20:24 11 JUDGE HAYNES: But then the legislature adopted the
09:20:26 12 map that the Supreme Court essentially tossed out, right?

09:20:28 13 MS. KANE: Essentially, yes.

09:20:29 14 JUDGE HAYNES: It's an interesting fact pattern.

09:20:31 15 MS. KANE: Yes. And I think, again, what the history
09:20:34 16 of these cases show, particularly in one-person, one-vote
09:20:37 17 cases, the ones we've cited and, frankly, the plaintiffs have a
09:20:40 18 different interpretation of, it's our position that they,
09:20:43 19 again, expressly time and again talk about this issue of
09:20:46 20 deference.

09:20:46 21 Now, should -- I will note, too, that the Supreme
09:20:48 22 Court has had three opportunities to accept petitions for
09:20:55 23 *certiorari* on this issue in the *Garza* case from the Ninth
09:20:57 24 Circuit years ago, in the *Chen* case, and just last year in the
09:21:02 25 *Lepak* case out of the Fifth Circuit. It has rejected those

09:21:06 1 opportunities every time.

09:21:08 2 Should the Supreme Court perhaps decide eventually to
09:21:09 3 write on this issue, we might be in a different world. But the
09:21:11 4 current world that exists just provides no legal grounds upon
09:21:14 5 which to impose the rule that the plaintiffs are advocating for
09:21:17 6 in this case. And so that's why the State is here asserting
09:21:21 7 that it's proper to resolve this case on 12(b)(6) grounds.

09:21:25 8 JUDGE HAYNES: Let me ask you more along these lines.
09:21:28 9 I mean, this *Perez, Davis*, whatever it is, the thing in
09:21:30 10 Judge Garcia's court, has been going on for quite some time.
09:21:33 11 It's received a fair amount of publicity. Is there any
09:21:36 12 equitable or other sort of rule that would require people to
09:21:39 13 bring their -- their claim in that case? In other words --
09:21:42 14 because, as I said, there's going to be one map for Senate
09:21:45 15 District 2, 3, 4, 10. And you can't -- it seems to me,
09:21:49 16 practically, you can't have cases all over the State drawing
09:21:52 17 the same map.

09:21:53 18 MS. KANE: Certainly, Your Honor. I think in this
09:21:55 19 case, if -- if the Senate map was still at issue and there was
09:22:00 20 a lot of controversy about the Senate map, I think there would
09:22:04 21 be questions about, at least at minimum, consolidation of this
09:22:07 22 case with the San Antonio -- the matter that's still pending in
09:22:10 23 San Antonio. Because there is no current live controversy
09:22:14 24 about any Senate district lines, we did not ask for that.

09:22:18 25 But I think there were, if I'm not mistaken, a series

09:22:22 1 of cases that were filed in federal courts which related to the
09:22:27 2 maps back in 2011. Those cases ultimately were all
09:22:30 3 consolidated in San Antonio for this very reason, that you need
09:22:33 4 to have one court really looking at them. But in this case the
09:22:36 5 Senate map is not in controversy at this time. That's the only
09:22:41 6 map that's not in controversy at this time.

09:22:43 7 JUDGE HAYNES: So that's why they picked it. I've
09:22:46 8 been wondering.

09:22:47 9 MS. KANE: One would surmise.

09:22:48 10 But that is really -- our argument is fairly
09:22:51 11 straightforward. I don't want to take up any more of the
09:22:53 12 court's time. I'm going to reserve the rest of my time for
09:22:56 13 rebuttal unless the court have any further questions.

09:22:59 14 JUDGE YEAKEL: Thank you. We'll hear from the
09:23:00 15 respondent.

09:23:06 16 MR. CONSOVOY: Good Morning, Your Honors. May it
09:23:07 17 please the Court, William Consovoy on behalf of the plaintiffs.

09:23:11 18 The principal defect and the argument raised by the
09:23:14 19 State that it fails to grapple with the fundamental right
09:23:16 20 protected by the one-person, one-vote principle, as established
09:23:19 21 in *Baker v. Carr* and *Reynolds v. Sims*. That right is the right
09:23:24 22 of a voter to an equally weighted vote.

09:23:26 23 Under the State's position, if there was district A
09:23:29 24 with a million total population and district B with a million
09:23:32 25 total population, and district A had one voter and district B

09:23:38 1 had a million voters, we would lose that case. The one-person,
09:23:41 2 one-vote right would have been protected because they chose
09:23:44 3 total population. That argument cannot be squared with either
09:23:48 4 *Baker*, which establishes the judiciability of the claim or
09:23:52 5 *Reynolds* --

09:23:53 6 JUDGE YEAKEL: So you modify or take literally
09:23:59 7 one-person, one-vote and say that we should only look at
09:24:04 8 voters?

09:24:06 9 MR. CONSOVOY: We believe that the -- what is
09:24:08 10 fundamentally protected by *Reynolds v. Sims* is voters. We do
09:24:11 11 not believe the State can only consider that. We believe the
09:24:14 12 State can also consider a multitude of other factors, including
09:24:17 13 total population. The Supreme Court has made clear that there
09:24:20 14 is deference to the legislature. They can look at county
09:24:23 15 lines. They can look at communities of interest. Legislatures
09:24:25 16 look at a multitude of factors. And total population could be
09:24:29 17 one of them.

09:24:29 18 JUDGE HAYNES: Okay. And that leads me to my
09:24:31 19 practical question. So you hit a home run, we rule exactly as
09:24:34 20 you've requested in your complaint, that the legislature is to
09:24:37 21 consider CVAP. How is that even enforceable? I mean, I don't
09:24:42 22 even understand what that means. I could -- the legislature
09:24:45 23 can sit there and have some professor come in and present CVAP
09:24:48 24 and they all sit in their seats and listen attentively. Now
09:24:52 25 have they considered it? Are they now in compliance with the

09:24:55 1 order, and then they go off and enter a map that looks a lot
09:24:58 2 like the one you're challenging? Or do they have to show they
09:25:01 3 took some number? I mean, how do they consider it?

09:25:05 4 MR. CONSOVOY: Well, I think what our position is --
09:25:07 5 and I'm glad I have a chance to clear this up -- is that it was
09:25:10 6 a defect simply to not consider it. That alone, since it's a
09:25:14 7 constitutionally protected right and this is an equal
09:25:17 8 protection matter, the failure to take into account a
09:25:20 9 constitutionally protected interest --

09:25:21 10 JUDGE YEAKEL: Well, how do we know that? How do we
09:25:23 11 know they didn't just talk about it?

09:25:24 12 MR. CONSOVOY: The 1981 Texas Attorney General
09:25:27 13 opinion told them that they were not allowed to consider it.
09:25:29 14 They then repealed -- this Texas Constitution used to require
09:25:32 15 consideration of equalizing voter. In 1981 the Texas Attorney
09:25:37 16 General issued an opinion saying that was unconstitutional.

09:25:40 17 JUDGE HAYNES: But it wasn't a matter of consider.
09:25:41 18 It was use.

09:25:42 19 MR. CONSOVOY: We believe first consider, then use,
09:25:45 20 if feasible. And the question here is -- now, we think that
09:25:49 21 Texas would have no argument as to why it's not feasible.
09:25:52 22 That's why we put it in the declaration.

09:25:54 23 JUDGE HAYNES: I think there's another layer here,
09:25:56 24 and it goes back to -- maybe I'm the only one who thinks the
09:25:59 25 *Perez* case -- *Perez*, slash, *Davis* case has any relevance here.

09:26:02 1 But the court drew the map that the legislature adopted. So
09:26:05 2 are we going to say the court didn't consider the proper
09:26:09 3 constitutional aspects? I mean, the Supreme Court said they
09:26:10 4 didn't give enough deference to the legislature. I get that.

09:26:13 5 But nobody has said they didn't consider the
09:26:15 6 proper -- I mean, the three Article III judges sat around not
09:26:21 7 considering the Federal Constitution in what they drew. And if
09:26:23 8 that's what the State adopts, isn't it kind of weird for a
09:26:25 9 different set of three judges to say, Hah. You did what the
09:26:29 10 judges told you to, but we're going to come back and make you
09:26:31 11 do it again?

09:26:32 12 MR. CONSOVOY: So in that case the court redrew the
09:26:34 13 map to solve a section 5 of the Voting Rights Act problem. Of
09:26:38 14 course, section 5 has been ruled unconstitutional. So the
09:26:42 15 basis -- the initial basis for that interim map, if it arose
09:26:45 16 now, like if there was this ping-pong concerning that, wouldn't
09:26:48 17 even exist.

09:26:49 18 Secondly, the Senate map was not before the Supreme
09:26:52 19 Court. It was the only map that was not challenged by Texas on
09:26:54 20 appeal. So when the Supreme Court raised its concern, it was
09:26:57 21 about the Congressional maps and the State House map, not this
09:27:01 22 map at all. And then after that litigation ended, Texas
09:27:03 23 decided, we're going to adopt the interim map as our own which
09:27:08 24 creates a new map for Texas that could be challenged
09:27:11 25 independently, which occurs all the time. And so there's

09:27:14 1 nothing really that unusual.

09:27:15 2 JUDGE HAYNES: It's like the arcade game where
09:27:16 3 you're -- I don't remember what it is -- a mole, a squirrel,
09:27:19 4 somebody -- and before when I said "hitting a squirrel," I
09:27:22 5 didn't mean a real one. I meant an arcade game, just to be
09:27:26 6 clear.

09:27:26 7 But isn't this like that?

09:27:27 8 MR. CONSOVOY: I don't think so, Your Honor.

09:27:29 9 JUDGE HAYNES: We hit something, we solve this
09:27:31 10 problem, now whoosh over here, we've got this other problem.
09:27:32 11 Okay. Now we'll solve this problem and we're going to get
09:27:34 12 another. Because although they repealed the preclearance, they
09:27:37 13 never repealed -- or "repeal" is the wrong word. The Supreme
09:27:39 14 Court sort of invalidated the preclearance, but the basic
09:27:43 15 premise of the Voting Rights Act is still there.

09:27:45 16 MR. CONSOVOY: Section 2 is there.

09:27:47 17 JUDGE HAYNES: Well, that's an important thing. So
09:27:48 18 however we get there to solving the problem, are we creating it
09:27:52 19 by your methodology?

09:27:54 20 MR. CONSOVOY: I don't think so. I think, again,
09:27:57 21 there's been no appellate challenge to this map. The section 5
09:28:01 22 issue, which was the only basis on which the lines were redrawn
09:28:04 23 by the court, is no longer an issue. So if Texas goes back to
09:28:08 24 the drawing board and does what we believe it's
09:28:11 25 constitutionally obligated to do, yes, of course someone may

09:28:13 1 challenge that map in court. We can't -- we can't stop that
09:28:16 2 any more than we would in any other case.

09:28:17 3 In *Reynolds v. Sims*, when Alabama went back to draw
09:28:21 4 its map, conceivably, there may have been some challenge to it.
09:28:24 5 But I don't think the fact that a map can be -- a new map can
09:28:27 6 be subject to subsequent challenge is a basis for denying the
09:28:30 7 rights of people who have been injured.

09:28:31 8 JUDGE HAYNES: Okay. So if you're sitting there next
09:28:34 9 year in the well of the legislature and we've ruled that
09:28:37 10 they're supposed to consider, we've given you everything you've
09:28:41 11 asked for, what are they supposed to be doing? Physically what
09:28:43 12 are they supposed to be doing?

09:28:45 13 MR. CONSOVOY: So the same number -- we use numbers
09:28:48 14 that the Texas Legislature itself created. The numbers here
09:28:51 15 are not of our creation. And it's curious that the State wants
09:28:54 16 to find concern with numbers that the State itself creates
09:28:57 17 because it needs to use those numbers. The task we're asking
09:29:02 18 the legislature to engage in here is a task that is routinely
09:29:04 19 done in --

09:29:04 20 JUDGE HAYNES: That's terrific. Physically, what are
09:29:07 21 they doing?

09:29:08 22 MR. CONSOVOY: Well, they're going to need to look
09:29:09 23 at -- to equalize voter population. That's the principal
09:29:12 24 objective. And then they have a broad range of discretion.
09:29:16 25 The Supreme Court has said anything inside 10 percent is, you

09:29:19 1 know, prima facie reasonable. It can be subject to challenge
09:29:23 2 if it's arbitrary.

09:29:23 3 But if Texas said, We want to increase a little bit
09:29:26 4 of the discrepancy on voter population to accommodate the total
09:29:29 5 population, to accommodate to communities of interest, they can
09:29:32 6 do that. And then that will be subject to, you know, review
09:29:35 7 later to see whether they did -- they did their job right. But
09:29:39 8 that's what *Reynolds v. Sims* requires. That's the point of the
09:29:42 9 case, is to make sure that voters are protected first, but to
09:29:46 10 give the states discretion to take account of other interests
09:29:48 11 as well. And that's a legislative task.

09:29:50 12 JUDGE YEAKEL: So what is our order supposed to read?
09:29:53 13 In this case we say we want you to look at what you suggest.
09:29:58 14 Then we get the next case where somebody says there's a
09:30:02 15 different population. Are you asking us to prepare a checklist
09:30:06 16 for the legislature, and then they have to make sure they set
09:30:11 17 aside an hour or a half a day or a day to take up that topic
09:30:15 18 when they're dealing with redistricting?

09:30:16 19 MR. CONSOVOY: No, Your Honor. We're not asking for
09:30:18 20 a checklist at all. We think *Reynolds v. Sims* establishes the
09:30:21 21 constitutional rule. And the constitutional rule is that
09:30:24 22 voters are entitled to an equally weighted vote, and the
09:30:27 23 districts must be drawn to protect that right. Now, all we're
09:30:30 24 saying is that Texas needs to go back and fulfill that duty.

09:30:34 25 In the course of fulfilling that duty, a legislature,

09:30:36 1 as it already does, will look at other things it wants to
09:30:39 2 accommodate as well. And all we're saying is that's okay, too.

09:30:42 3 JUDGE YEAKEL: To what extent are minors and
09:30:45 4 incarcerated felons and illegal aliens entitled to
09:30:50 5 representation?

09:30:52 6 MR. CONSOVOY: We do not believe that *Reynolds v.*
09:30:55 7 *Sims* protects -- protects any independent right to
09:30:59 8 representation. *Burns* we think -- if that were true, *Burns*
09:31:01 9 would have to be wrong, because people who are -- you know,
09:31:05 10 there was military people -- you know, they were -- they were
09:31:08 11 in Hawaii, military people. If there was a right to
09:31:13 12 representation, it was deprived by Hawaii, and the Supreme
09:31:16 13 Court found there was no problem with excluding them from the
09:31:18 14 base. So we think *Burns* -- and this is what -- *Chen* says that
09:31:20 15 as well. That's the reasoning of the *Garza* majority opinion.

09:31:23 16 JUDGE YEAKEL: So tell me -- answer my question.
09:31:25 17 Tell me when, if you're a nonvoter, you are entitled to
09:31:30 18 representation ever.

09:31:34 19 MR. CONSOVOY: Within the meaning of the
09:31:35 20 Fourth Amendment, we do not believe they are.

09:31:37 21 JUDGE YEAKEL: All right.

09:31:38 22 MR. CONSOVOY: That is a political right, but not a
09:31:40 23 constitutional right. It's not a constitutional enforceable
09:31:44 24 right.

09:31:45 25 JUDGE YEAKEL: So we put the million people in the

09:31:47 1 district that you mentioned. At what point is the tipping
09:31:52 2 point reached?

09:31:53 3 MR. CONSOVOY: We think the framework that's already
09:31:56 4 been established by the Supreme Court applies. We're not
09:31:59 5 looking to see -- I think this is --

09:32:00 6 JUDGE YEAKEL: We ignore everybody but registered
09:32:03 7 voters?

09:32:03 8 MR. CONSOVOY: Not ignore. The first step would be
09:32:07 9 to make sure that you satisfy the one-person, one-vote
09:32:10 10 obligation. We're not asking to expand that.

09:32:14 11 JUDGE YEAKEL: Who is the one person that gets that
09:32:17 12 one vote?

09:32:17 13 MR. CONSOVOY: The eligible voter.

09:32:19 14 JUDGE YEAKEL: All right. So we look first to
09:32:20 15 eligible voters. That's the primary focus of the court, is
09:32:23 16 people who have bothered to go register.

09:32:27 17 MR. CONSOVOY: Yes. No. They're eligible. So not
09:32:30 18 registered.

09:32:30 19 JUDGE YEAKEL: Okay. Eligible.

09:32:30 20 JUDGE HAYNES: Well, they're not eligible to vote if
09:32:32 21 they're not registered.

09:32:34 22 MR. CONSOVOY: I'm sorry, Your Honor?

09:32:34 23 JUDGE HAYNES: They are not eligible to vote if
09:32:34 24 they're not registered. At least in Texas you have to register
09:32:36 25 30 days in advance. So 29 days before the election or actually

09:32:40 1 on the day of the election, Joe Blow over here who was born in
09:32:43 2 America and is over 18 and is not a felon nonetheless can't
09:32:47 3 vote if he didn't register.

09:32:48 4 MR. CONSOVOY: True. But he has the right to
09:32:51 5 register. So he falls within the broader class we're talking
09:32:53 6 about here.

09:32:54 7 JUDGE HAYNES: Okay. So right to register.

09:32:55 8 MR. CONSOVOY: Sure. Right. Of age, has not had
09:32:59 9 their right to vote taken away from them, meets all other
09:33:02 10 criteria for what would be a, you know, citizen voting age
09:33:05 11 population, which is the established -- you know, one of the
09:33:07 12 metrics that they could utilize here.

09:33:08 13 And so I think it's important for us to just make
09:33:11 14 sure our argument is clear. We're not looking to expand the
09:33:13 15 law here. We're not looking to change the law here. There's
09:33:16 16 an open question. Justice Thomas acknowledges an open
09:33:19 17 question. Judge Kozinski acknowledges it's an open question.
09:33:22 18 Judge Garwood when he reached his decision in *Chen* agreed that
09:33:25 19 it was an open question, which is when one-person, one-vote
09:33:29 20 talks about equalizing population, is it talking about total
09:33:32 21 population or voter population?

09:33:34 22 JUDGE HAYNES: But 200-plus years into our country
09:33:37 23 and, you know, over 100 years since the passage of Fourteenth
09:33:41 24 Amendment, if it's an open question, can we really say that the
09:33:45 25 legislature violated the constitution by not doing it your way,

09:33:48 1 when no one else has been able to figure out that your way is
09:33:52 2 the only way?

09:33:52 3 MR. CONSOVOY: I think the answer is yes. The same
09:33:55 4 argument could have been made in *Reynolds v. Sims*. Until
09:33:58 5 *Reynolds v. Sims*, no Supreme Court case in 150 years had ever
09:34:02 6 interfered with legislative redistricting on any basis. We
09:34:05 7 could have said there's no constitutionally founded right --

09:34:07 8 JUDGE HAYNES: If I'm not mistaken, *Reynolds* is about
09:34:10 9 as old as I am. That's pretty darn old. So in 50 years we
09:34:13 10 haven't really evolved very much farther.

09:34:16 11 JUDGE YEAKEL: *Reynolds* is quite young. Don't tell
09:34:20 12 me it's an old case.

09:34:22 13 MR. CONSOVOY: I agree, Judge Yeakel. I think it is
09:34:25 14 interesting that the question has remained open, and I think
09:34:27 15 the reason why is because of changing demographics, honestly.
09:34:31 16 You know, in 1950 total population of voter population,
09:34:34 17 particularly in the states that were at issue in those cases
09:34:37 18 pretty much approximated each other. There wasn't a real
09:34:40 19 variance there. Over time these variances have developed. We
09:34:43 20 saw it in California in 1990. We saw it in Hawaii.

09:34:48 21 JUDGE HAYNES: I know. I mean, I grew up in Florida
09:34:50 22 where we had a very large immigrant Cuban population as a
09:34:54 23 result of the events of the early '50s, early '60s in Cuba. So
09:34:56 24 that's been 50 years in the making.

09:34:57 25 MR. CONSOVOY: Yeah. I'm not familiar with the

09:34:59 1 specific facts --

09:35:00 2 JUDGE HAYNES: So the point is there's plenty of
09:35:02 3 places where people come in -- refugees and immigrants from
09:35:06 4 other countries come in in large waves to particular states and
09:35:09 5 so forth and alter the balance of the population. This is not
09:35:12 6 new as of 2014.

09:35:15 7 MR. CONSOVOY: No. And --

09:35:16 8 JUDGE HAYNES: And, frankly, the country is sort of
09:35:19 9 founded on immigrants coming here.

09:35:21 10 MR. CONSOVOY: And we don't disagree with that. But
09:35:23 11 it's called the one-person, one-vote right. And the way to
09:35:28 12 think about it is this: If a nonvoter, a noncitizen, or a
09:35:32 13 felon came into this courtroom and said, I want to bring a
09:35:36 14 one-person, one-vote challenge because I don't have total
09:35:38 15 population in my district, would that person have standing to
09:35:41 16 bring that case? *Baker v. Carr* says no.

09:35:44 17 The reason why the court first found that a
09:35:48 18 judicially enforceable right, if the court goes back and looks
09:35:52 19 at that case, Justice Brennan's opinion has an entire section
09:35:55 20 on standing that says they have standing, they are eligible
09:35:58 21 voters in these counties in Tennessee, and that that's what
09:36:01 22 creates the -- a right to bring an action to court.

09:36:04 23 If it truly is a representational interest, then the
09:36:07 24 felon would have a right to challenge the population of their
09:36:10 25 district in this court because they would have injury from

09:36:13 1 their representational rights being injured. And we just don't
09:36:16 2 think that can be reconciled with Supreme Court precedent. The
09:36:18 3 right is the right held by voters, and that right clearly has
09:36:21 4 been violated here. We're talking about deviations nearing
09:36:25 5 30 to 50 percent. The most the Supreme Court has ever accepted
09:36:28 6 of a deviation is 16.4.

09:36:30 7 JUDGE YEAKEL: Where do we stop that inquiry? At
09:36:33 8 what group -- how many groups do we look at -- population
09:36:37 9 groups to see where there's deviation?

09:36:39 10 MR. CONSOVOY: Well, as far as *Reynolds v. Sims* goes,
09:36:42 11 we think Texas could just do voter population. Our point is,
09:36:47 12 is that they don't have to stop there. So I don't think we're
09:36:50 13 putting Texas in a difficult spot, where we are forcing, you
09:36:54 14 know, multiple inquiries upon Texas. The point is that
09:36:57 15 *Reynolds v. Sims* says protect voters.

09:37:01 16 But that's why the court created this latitude, this
09:37:03 17 10 percent deviation latitude, because they understood that
09:37:06 18 Texas or any other state might have an important policy
09:37:09 19 interest in protecting other -- accommodating other values.
09:37:12 20 And one of those might be total population, which would help
09:37:15 21 protect the rights of immigrants and nonvoters. But you can't
09:37:19 22 use a policy consideration to overcome a constitutional
09:37:23 23 interest, and that essentially is what Texas's argument is
09:37:26 24 here. I go back to my --

09:37:27 25 JUDGE HAYNES: Now let me ask you this: Do you have

09:37:29 1 an injury-in-fact if despite the number of CVAP and so on and
09:37:34 2 so forth, the reality is, because no one votes in your
09:37:36 3 district, that your vote actually counts more? I mean, there's
09:37:40 4 places where -- where elections are decided by two or three
09:37:44 5 votes and there's places where it's thousands and thousands.
09:37:47 6 And so people vote in rather odd patterns sometimes and,
09:37:51 7 frankly, very few people really do vote, particularly in these,
09:37:55 8 sort of, off-year elections and so on.

09:37:58 9 So does that make a difference to your injury-in-fact
09:38:00 10 if, in fact, you're in a district where, because no one else
09:38:03 11 votes, your vote actually counts more than over here where
09:38:06 12 there's a bunch of people who go around voting?

09:38:08 13 MR. CONSOVOY: The Supreme Court has never held that.

09:38:10 14 JUDGE HAYNES: Well, they've never held your way
09:38:12 15 either. We're in this brave new world that you're creating.
09:38:15 16 I'm just exploring it.

09:38:16 17 MR. CONSOVOY: Sure. The Supreme Court has said that
09:38:17 18 you don't judge election-related rights by whether your vote
09:38:21 19 impacted the outcome.

09:38:22 20 JUDGE HAYNES: No. I'm not talking about the right.
09:38:24 21 I'm talking about injury-in-fact. Has your client been injured
09:38:26 22 in fact if the truth is that, because of the way people vote,
09:38:30 23 this person's vote is actually being counted more heavily
09:38:35 24 because no one else is voting?

09:38:36 25 MR. CONSOVOY: And the answer is they have been

09:38:38 1 injured in fact because the right here is a right to
09:38:40 2 populations that make sure that the votes are equally weighted.
09:38:44 3 The court has never, and the standing inquiry wouldn't allow
09:38:47 4 you to look at outcome to determine whether at the outset the
09:38:51 5 injury would exist.

09:38:52 6 You would have to -- let's say no elections had been
09:38:56 7 held on these districts. You would have to wait until the end
09:38:58 8 of election, see who was impacted, and then reverse engineer
09:39:01 9 back. That's just not how standing is done. Standing is done
09:39:05 10 at the outset. And rightly so. You could imagine the series
09:39:07 11 of ballot access issues which have come up in this Circuit,
09:39:11 12 certainly, over the course of time.

09:39:12 13 And imagine someone saying, Well, it doesn't matter
09:39:14 14 if you were denied your right to vote because the vote wasn't
09:39:18 15 within one vote, and so your vote wouldn't have mattered. You
09:39:20 16 have no standing. That's just not how the inquiry is done.
09:39:22 17 Nor should it be.

09:39:23 18 JUDGE YEAKEL: Your argument is that the court should
09:39:26 19 compel the legislature to look at certain factors as opposed to
09:39:30 20 just looking at a plan that is passed by the legislature and
09:39:34 21 determining if it reasonably accounts for voters; is that
09:39:38 22 right?

09:39:39 23 MR. CONSOVOY: Under the circumstances here, yes. It
09:39:42 24 wouldn't always be the case. And I understand Your Honor's
09:39:45 25 question about are we looking at plans or are we looking at

09:39:48 1 rules. And we agree that you're looking at plans. And what
09:39:51 2 we're actually doing is asking to give Texas a second chance.

09:39:54 3 JUDGE YEAKEL: But you're saying we should scratch
09:39:56 4 beneath the surface of the plan and see what was considered
09:39:59 5 other than just looking at the plan and seeing -- judging its
09:40:05 6 overall reasonableness and whether it takes into account the
09:40:09 7 rights of the people in the area?

09:40:10 8 MR. CONSOVOY: I think we're taking a slightly
09:40:12 9 different position than that. I think court could -- and I
09:40:15 10 think our position is actually providing more deference to the
09:40:18 11 state. Let me see if I can try to explain why.

09:40:20 12 We want the court to look at the plan, and there's no
09:40:23 13 question the plan fails to protect the voters. So that's the
09:40:27 14 holding. The question, then, is remedy. And Your Honor is
09:40:30 15 right. The court could conceivably just --

09:40:33 16 JUDGE YEAKEL: I'm not sure Ms. Kane agrees with you,
09:40:35 17 that the plan fails to protect voters, but I'm sure she will
09:40:40 18 tell us about that in her remaining time.

09:40:42 19 MR. CONSOVOY: Well, if voter equality matters, I
09:40:44 20 find it hard to believe that the State could defend deviations
09:40:47 21 of 30 to 40 percent. But I agree the State has the right to
09:40:50 22 try to do that.

09:40:51 23 JUDGE YEAKEL: Well, why do we stop at eligible
09:40:53 24 voting population? Why don't we get to the City of Austin,
09:40:58 25 where under 11 percent of the population votes in city

09:41:01 1 elections, and saying, Well, this is just horrible, that
09:41:04 2 there's less than 11 percent of the population deciding what my
09:41:09 3 tax base is going to be and how we're going to spend our money?
09:41:13 4 Why don't we eventually, with your argument, get down to those
09:41:17 5 deeper levels.

09:41:18 6 MR. CONSOVOY: Because of *Reynolds v. Sims* and the
09:41:20 7 holding that it creates, which is that, again -- or *Baker*,
09:41:23 8 really, which is who has standing to bring the claim? The
09:41:26 9 person who has standing to bring the claim is the person who
09:41:29 10 was entitled to vote. They may not exercise that right, but
09:41:32 11 what *Baker* and *Reynolds* say is, whether they exercise that
09:41:35 12 right or not, you have to look at it from the outset, when the
09:41:38 13 plan is created. And the court doesn't know who is going to
09:41:41 14 vote when a plan is created. There's no way to know. And so
09:41:44 15 you create districts make sure that somebody's vote isn't
09:41:47 16 weighted doubly at the outset of the creation of the plan
09:41:51 17 versus somebody else. That's the fundamental. The court's not
09:41:54 18 engaging in trying to ensure by percentage of actual
09:41:57 19 participation. That's just not the way *Reynolds v. Sims* works.

09:42:01 20 JUDGE HAYNES: Okay. Let me go to the other end. So
09:42:05 21 we've been talking about, What if you win? All right. What if
09:42:07 22 you lose so badly that we think this just wasn't even a claim
09:42:10 23 of any substance. I know you don't want to concede that, but
09:42:13 24 let's just hypothetically say we conclude that. I want to get
09:42:15 25 into this issue of the procedure.

09:42:16 1 If we as a three-judge panel conclude this case was
09:42:19 2 so insubstantial it didn't even need to be a three-judge panel,
09:42:23 3 what is the procedure then? You don't have to concede that
09:42:27 4 that would be the case at all. But if that happened, what
09:42:29 5 would be the procedure?

09:42:31 6 MR. CONSOVOY: I confess I don't quite know
09:42:33 7 procedurally how it would work. I would say that as the Second
09:42:35 8 Circuit opinion, *Kalson*, highlights, it is a somewhat
09:42:40 9 interesting and unresolved question whether it can be resolved
09:42:43 10 as insubstantial based on the merit of the case. It's been
09:42:45 11 done, and we don't dispute it has been done. But I think it
09:42:48 12 would probably be incumbent on the court to explain in that
09:42:53 13 opinion why when 2024 says a three-judge panel shall be
09:42:57 14 instituted with respect to merits of the claim.

09:42:59 15 You know, if the person lacks standing or they failed
09:43:01 16 to pay their filing fee or something that looks obviously
09:43:07 17 deficient from the face of the complaint, I think there is
09:43:09 18 reasonable room to say you can dismiss the claim as
09:43:09 19 insubstantial. Whether you just simply don't like the claim
09:43:12 20 for 12(b)(6) reasons, I think it's an open question, and, you
09:43:15 21 know, I think the court would need to grapple with that.

09:43:21 22 And I personally think -- we haven't briefed this,
09:43:23 23 but I do think there is a question about how the statute could
09:43:24 24 be interpreted to resolve it on the merits on insubstantial
09:43:27 25 grounds. But I don't think the court needs to reach these

09:43:30 1 questions. Judge Kozinski wrote a lengthy dissent. Judge
09:43:30 2 Garwood said this is a close question in *Chen*. Justice Thomas
09:43:34 3 wrote a dissent in the denial of cert. saying it's an important
09:43:35 4 unopened question that the court needs to resolve. The idea
09:43:38 5 that that question is so insubstantial as to be facially
09:43:43 6 deficient I think is just a hard argument to make.

09:43:46 7 JUDGE HAYNES: So you -- so you are saying you could
09:43:49 8 lose on 12(b)(6), but it wasn't an insubstantial claim?

09:43:53 9 MR. CONSOVOY: Sure.

09:43:54 10 JUDGE HAYNES: You think there is a -- a difference
09:43:56 11 between wholly insubstantial and a 12(b)(6) loser?

09:44:00 12 MR. CONSOVOY: Yeah. Different worlds completely.
09:44:02 13 Insubstantial is basically frivolous. That, I think, is what
09:44:08 14 it boils down to. I think the Second Circuit pushed the limits
09:44:11 15 of that. If you think you can do it on the merits at all, then
09:44:14 16 it would have to be, you know -- Judge Calabresi said
09:44:17 17 basically, you know, borderline frivolous.

09:44:20 18 And I think whatever the court thinks of the merits
09:44:22 19 of our claims, I don't think the court should consider them to
09:44:24 20 be a frivolous argument. I think this is a very serious issue.

09:44:27 21 JUDGE YEAKEL: How about borderline frivolous?

09:44:29 22 MR. CONSOVOY: Not even borderline.

09:44:31 23 JUDGE YEAKEL: Is this not an issue that could only
09:44:33 24 have been raised after we developed computers of such a
09:44:40 25 sophistication that they can look at all of these little

09:44:43 1 factors, such as who's registered and who's not registered?

09:44:45 2 MR. CONSOVOY: I think it's been made easier. I
09:44:47 3 think there's no way -- I agree with that. So easy now that
09:44:50 4 Texas generated these statistics on its own without any
09:44:55 5 complaint or dispute about the difficulty in doing so.

09:44:58 6 And, you know, in *Reynolds* the court said -- and I
09:45:00 7 think this is an important point. It helps to explain why it's
09:45:04 8 been so slow for this issue to come around. It said the court
09:45:06 9 was establishing a basic constitutional rule. And it said,
09:45:09 10 When the Supreme Court creates, you know, undiscovered, you
09:45:12 11 know, rights like that, a common-law approach, a case-by-case
09:45:16 12 approach, is the right way to resolve these things. And so
09:45:18 13 over time different factors are going -- are going to weigh
09:45:22 14 differently, and it's going to matter differently in different
09:45:25 15 jurisdictions. And I don't think that's unusual or any reason
09:45:28 16 to hesitate. This data is easily available now. It's used in
09:45:32 17 section 2 cases every day.

09:45:32 18 JUDGE HAYNES: I'm going to challenge all
09:45:34 19 assumptions. That's one of my mottos. And so I understand the
09:45:36 20 State generated a bunch of statistics. I'm not sure that makes
09:45:42 21 them accurate. And one of the problems of this citizens of
09:45:44 22 voting age population is a fairly fluid concept in a place like
09:45:48 23 Texas because, for example, when we had Hurricane Katrina, we
09:45:52 24 had a large influx of evacuees from New Orleans. Those are
09:45:56 25 voting age people. They are citizens of the United States.

09:45:59 1 If they stay beyond the immediate threat of Katrina
09:46:05 2 because there's no home to go back to, then they become
09:46:08 3 citizens of Texas fairly easily. They can reside there 30 days
09:46:12 4 and intend to stay, and they become citizens. But that's all
09:46:15 5 of a sudden really altered the landscape of a major
09:46:19 6 metropolitan area like Dallas or I'm sure -- I don't know much
09:46:22 7 about Austin -- Dallas, Houston, et cetera.

09:46:25 8 As well you have people who are -- you know, my
09:46:27 9 parents are naturalized citizens. Well, there was a day they
09:46:30 10 weren't citizens, and then there was a day they were, the very
09:46:33 11 next day. But they're not in your number because your number
09:46:37 12 necessarily is at some other time. As well we have a lot of
09:46:40 13 people who are in and out and whatever from this or that, and
09:46:43 14 maybe immigration law has changed and somebody who was not
09:46:46 15 lawfully here becomes lawfully here or gets on a path to
09:46:49 16 citizenship.

09:46:50 17 And so when you're doing redistricting every 10
09:46:53 18 years, you're not able to account for that, as well as you're
09:46:56 19 maybe not finding those citizens of voting age population. You
09:47:00 20 just generated a number that made the computer happy. So
09:47:03 21 address that. I know that was a long question.

09:47:05 22 MR. CONSOVOY: Let me see if I can give you a
09:47:06 23 four-part answer to that question, if I might.

09:47:08 24 JUDGE HAYNES: All right.

09:47:08 25 MR. CONSOVOY: Number one, the same critique could be

09:47:10 1 made of the census, and it often is. People move in and out of
09:47:15 2 jurisdictions. If you look at states like Pennsylvania and
09:47:16 3 North Carolina, for instance, over a 10-year period, massive
09:47:19 4 total population shifts. The Supreme Court has said we're not
09:47:20 5 going to let the perfect be the enemy of good. And the good
09:47:22 6 here in our case is voter equality. But the same critique
09:47:26 7 could be made of the census -- inaccurate, it doesn't account
09:47:29 8 for the shifting population. So I don't think those kind of
09:47:31 9 critiques, when the state is relying on one that has its own
09:47:35 10 flaws, it really has much to offer.

09:47:37 11 Second, we're at the motion to dismiss stage here.
09:47:40 12 So the court needs to accept as true that the numbers we offer
09:47:44 13 exist and that they are accurate and that they are feasible.
09:47:48 14 And then at summary judgment the State can potentially try to
09:47:52 15 offer critiques, but we actually think that would fail, too,
09:47:55 16 because this is a job for the legislature to figure out. You
09:47:58 17 know, in equal protection cases, litigants don't get to create
09:48:02 18 rationales for legislatures. Legislatures have to do this work
09:48:04 19 itself, and then it's reviewed accordingly.

09:48:07 20 And so I guess those are really the two main ones I
09:48:10 21 would -- I would, you know --

09:48:12 22 JUDGE HAYNES: Since you touched on the summary
09:48:13 23 judgment, I know you had a scheduling conference with
09:48:16 24 Judge Yeakel. And, necessarily, of course, that needs to be
09:48:22 25 handled by one judge, so I wasn't privy to it. But I'm

09:48:25 1 wondering, like, what's next? So if we just deny the motion to
09:48:27 2 dismiss, what's this going to look like practically speaking?
09:48:34 3 What discovery do you need or are you going to do? What's
09:48:35 4 going to happen? What are we -- what next convocation of the
09:48:39 5 three of us might we expect, et cetera?

09:48:41 6 MR. CONSOVOY: Right. So the short answer is, in our
09:48:43 7 view, very, very little. If the court were to deny this motion
09:48:46 8 to dismiss, it will have found that we're correct about the
09:48:49 9 nature of the right and that the 10 percent paradigm that
09:48:53 10 Supreme Court has created for the protection of that right
09:48:56 11 exists here.

09:48:56 12 The only question left then is, can Texas survive
09:48:59 13 summary judgment within that system of review which says,
09:49:02 14 outside 10 percent, they have the burden of bearing an
09:49:06 15 appropriate justification for going there above a certain
09:49:08 16 threshold, as Judge Schneider pointed out, it becomes
09:49:13 17 constitutionally intolerable. They have the obligation then to
09:49:15 18 say, Okay. We have -- well, they can try to dispute the
09:49:17 19 numbers. I don't think they will. They're their numbers. So
09:49:20 20 I don't think there will be any discovery about the numbers
09:49:23 21 that were created here.

09:49:24 22 So then the question is, can Texas defend those
09:49:26 23 numbers? We say there's no material issue in dispute. There's
09:49:30 24 no triable issue. Why can't Texas defend these deviations?
09:49:33 25 One, deviations this large have never been accepted by the

09:49:36 1 Supreme Court. The Supreme Court said 16.4 is about as high as
09:49:39 2 we're willing to go.

09:49:40 3 JUDGE YEAKEL: But has the Supreme Court ever
09:49:42 4 examined that in this context?

09:49:44 5 MR. CONSOVOY: Well, yes and no. So, no, the Supreme
09:49:47 6 Court has not decided the underlying question, which is: What
09:49:51 7 is the nature of the population protected by *Reynolds v. Sims*?
09:49:55 8 But once the underlying question is resolved, the rest of it
09:49:57 9 follows directly like dominos right from that. Again, we're
09:50:01 10 not trying to create new rights. There's an open question
09:50:04 11 about the nature of the original right. And once that question
09:50:06 12 is resolved, the framework for evaluating that right has
09:50:08 13 already been set in place.

09:50:10 14 JUDGE YEAKEL: So you ask us to construe *Reynolds v.*
09:50:14 15 *Sims* and *Baker v. Carr* to say that we go first to the number of
09:50:17 16 people who would be eligible to vote in a district, and the
09:50:21 17 basis starts there?

09:50:22 18 MR. CONSOVOY: That is absolutely correct, yes. And
09:50:24 19 I think *Reynolds*, you know, it speaks for itself. It says --

09:50:30 20 JUDGE YEAKEL: Well, all Supreme Court cases speak
09:50:33 21 for themselves, but they speak in different voices.

09:50:35 22 MR. CONSOVOY: I understand that.

09:50:36 23 JUDGE HAYNES: But what the heck do they say?

09:50:38 24 JUDGE YEAKEL: Yeah.

09:50:38 25 MR. CONSOVOY: We think we've highlighted the key

09:50:42 1 passages that explain what the court's thinking was in those
09:50:44 2 cases. When it said, simply stated, you cannot have one voter
09:50:47 3 who has a greater weighted vote than another voter. If that
09:50:52 4 sentence has a meaning, this plan is unconstitutional.

09:50:54 5 Unless the Court has any further questions?

09:50:56 6 JUDGE YEAKEL: Thank you, Mr. Consovoy.

09:50:59 7 Ms. Kane, you've got about eight minutes to wrap up
09:51:01 8 here.

09:51:01 9 MS. KANE: Thank you, Your Honor. I think it's
09:51:03 10 telling that the plaintiffs in all of their arguments fail to
09:51:07 11 address the language from *Burns v. Richardson* which, of course,
09:51:10 12 followed *Reynolds v. Sims*. And we would point out that, in
09:51:13 13 order for them to be right, the Supreme Court is going to have
09:51:15 14 to overturn *Burns* because, in *Burns*, the court specifically
09:51:17 15 said, neither -- and again this was in the context of looking
09:51:22 16 at apportionment in which voter -- registered voters were the
09:51:27 17 base. Nevertheless, what the court said was: Neither in
09:51:29 18 *Reynolds* nor in any other decision has the Supreme Court
09:51:33 19 suggested that the states are required to include aliens,
09:51:35 20 transients, short-term, or temporary residents, or persons
09:51:39 21 denied the vote.

09:51:40 22 So there's a recognition there that, yes, you don't
09:51:42 23 have to include them. However, the court then went on to say:
09:51:44 24 The State's decision to include or exclude any such group
09:51:47 25 involves choices about the nature of representation which we

09:51:50 1 have found -- or excuse me -- which we have been shown no
09:51:54 2 constitutionally founded reason to interfere.

09:51:56 3 So this is a post-*Reynolds* decision in which the
09:51:59 4 court is expressly recognizing why those populations don't
09:52:01 5 necessarily have to be included. The decision to include them,
09:52:05 6 such as use of total population might include those
09:52:09 7 populations, is one for which they have, quote, no
09:52:11 8 constitutionally founded reason to interfere.

09:52:14 9 The plaintiffs fail to squarely address that because
09:52:17 10 they simply can't. Unless and until the Supreme Court decides
09:52:20 11 otherwise, the argument here that the states are required to
09:52:24 12 essentially use data that would exclude all of those
09:52:27 13 populations simply doesn't have any support.

09:52:29 14 JUDGE HAYNES: Let me ask you this: If we deny the
09:52:32 15 motion to dismiss, you said that for purposes of the motion to
09:52:35 16 dismiss, you concede that you could consider both and arrive at
09:52:38 17 some magical map. So if we deny the motion to dismiss and
09:52:42 18 we're done with that sort of presumption and that their facts
09:52:45 19 are correct, what then? I mean, are you going to challenge
09:52:47 20 that notion that we could harmonize the two -- "we" meaning
09:52:52 21 collectively, sort of, the courts and legislature -- could
09:52:55 22 harmonize total population with CVAP?

09:52:58 23 MS. KANE: So I think that there is an intermediate
09:53:00 24 question that would affect that, which is what Judge Yeakel
09:53:05 25 touched on. All of the cases to which the plaintiff referred

09:53:07 1 in which there was a 10 percent, kind of, threshold under which
09:53:11 2 the states were okay, but then there was some percentage
09:53:16 3 deviation beyond which the courts find justifiable were, again,
09:53:20 4 only in the context where there was one population set of data
09:53:23 5 at issue and not multiple sets of data where perhaps one set
09:53:28 6 was equalized but another set wasn't.

09:53:30 7 So if the court were to say that the plaintiffs have
09:53:34 8 stated a viable claim here, then it would also have to say that
09:53:37 9 the rule that applies when -- that the courts have applied in
09:53:41 10 the context of, frankly, cases that involved either total
09:53:44 11 population or voter population as the apportionment base, that
09:53:48 12 10 percent, slash, greater than 16 percent rule applies to an
09:53:55 13 analysis of either CVAP or voter age population and whatnot.

09:53:59 14 If the court were to decide that, then, of course, if
09:54:05 15 the numbers ultimately -- if we ultimately concede the accuracy
09:54:08 16 of the numbers, then it probably is true that we don't have
09:54:11 17 very far to go at that point. However, we have an equalized
09:54:15 18 total population that's not in dispute either.

09:54:18 19 So -- so what rule the court decides or what standard
09:54:22 20 by which the court decides to measure compliance with the Equal
09:54:24 21 Protection Clause, if it decides to hold that we have to
09:54:28 22 consider some other data other than total population, we're in
09:54:32 23 a completely new world. So you would -- the court would have
09:54:35 24 to fashion some standard of enforcement that then the rest of
09:54:39 25 this case would be measured by.

09:54:41 1 And that's why we advocated, frankly, for a 12(b)(6)
09:54:45 2 decision prior to moving to summary judgment, because without
09:54:48 3 knowing what that legal standard is in this brave new world
09:54:51 4 that the plaintiffs are asserting, then we don't have any real
09:54:54 5 guidance as to how we should be going about proving up a case
09:54:58 6 or defending a case, frankly, at that point. Because the rules
09:55:02 7 that exist now have existed in a world where this rule has
09:55:05 8 never been applied that the plaintiffs advocating for. And I
09:55:09 9 don't know --

09:55:10 10 JUDGE HAYNES: So there's no rules to govern new
09:55:12 11 rules.

09:55:13 12 MS. KANE: Frankly. To the extent there's a two-step
09:55:15 13 process here, once the first step changes, the second step has
09:55:18 14 to be clarified or at least the court has to make clear that
09:55:21 15 the second step that's applied in these other cases is now
09:55:24 16 going to apply with equal force even though the court has
09:55:27 17 changed step one of the analysis essentially by adopting the
09:55:30 18 plaintiff's new rule.

09:55:31 19 Again, there's no -- this is why, again, we believe
09:55:34 20 this case should be dismissed on 12(b)(6) because, again, in
09:55:37 21 *Burns* the court has found -- heretofore has not found that this
09:55:41 22 is a rule that is constitutionally required that the states
09:55:45 23 most comply with.

09:55:46 24 I will note just briefly on this question of
09:55:49 25 "insubstantiability." The *Kalson* case explained this issue by

09:55:52 1 saying: An insubstantial federal claim is not a claim validly
09:55:56 2 brought under federal law. As a result, it does not create
09:55:59 3 jurisdiction in any federal court, and a single judge is
09:56:01 4 permitted to dismiss such a claim with prejudice.

09:56:04 5 Again, because the *Burns* case, unless and until that
09:56:07 6 language is somehow altered or changed, we believe compels the
09:56:12 7 result of dismissal here. We believe that if this panel feels
09:56:15 8 necessary to dissolve and have one judge issue the order
09:56:18 9 dismissing, the *Kalson* case seems to indicate that would be
09:56:22 10 permissible, although, again, we do grant that the three-judge
09:56:26 11 panel could also issue an order as well.

09:56:28 12 Unless the court has any further questions, we'll
09:56:33 13 stand on our briefing. Thank you.

09:56:35 14 JUDGE YEAKEL: Thank you. The case is under
09:56:36 15 submission. The court's in recess.

09:56:40 16 (End of transcript)

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2 **WESTERN DISTRICT OF TEXAS)**

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